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RE MOHD NOR MD JADI; EX P UAC BHD

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[BANKRUPTCY NO: D7(D2)-29-6547-1992]
10 DECEMBER 2007

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BANKRUPTCY: *Receiving and adjudication orders - Rescission and annulment - Appeal against - Whether a second bankruptcy order could be allowed to be entered against same bankrupt for debts provable in first or prior bankruptcy - Bankruptcy Act 1967, ss. 6(3), 49(1), (2), 105(1)*

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This was an appeal by the judgment creditor against the decision of the Senior Assistant Registrar allowing the judgment debtor's application to rescind and annul the receiving and adjudication orders made against him on 16 May 1996 upon the petition herein of the judgment creditor. The judgment debtor's contention in the application was that he had previously been adjudicated a bankrupt on 21 January 1992 in the High Court and since the judgment in relation to the petition herein was taken prior to the first bankruptcy order, the judgment creditor's debt was provable in the first bankruptcy and the receiving and adjudication orders made in the petition herein should therefore be rescinded and annulled pursuant to s. 105(1) of the Bankruptcy Act 1967 ('Act'). The only issue requiring consideration was whether a second bankruptcy could be allowed to be entered against the same bankrupt for the debts provable in the first or prior bankruptcy.

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Held (allowing the appeal):

(1) The case of *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* and the cases cited by the judgment debtor were not authority for the proposition that a second bankruptcy is permissible only in respect of debts incurred after the first bankruptcy order, as contended by the judgment debtor. Equally, subs. (1) and (2) of s. 49 of the Act do not provide that a second bankruptcy must be in respect of liabilities and debts incurred after the date of the first bankruptcy. In *Sama Credit (supra)*, the Supreme Court in refusing to rescind and annul the receiving and adjudication orders that had been made, took into account the failure of the Official Assignee to advance the situation in court despite being equipped with all relevant information, and it further stated that the respondent there had acted in good faith without knowledge of the prior existing order. In the present case, the Official Assignee, who was also present in court, did not object when the receiving and adjudication orders were granted. The only difference between

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Sama Credit (supra) and the present case was that in the former, it was the Official Assignee who filed the application to rescind and annul the orders whereas in the latter, it was the judgment debtor. Be that as it may, the judgment debtor also could have applied to have the petition herein dismissed under s. 6(3) of the Act when it came up for hearing, which the judgment debtor failed to do. Based on the above factors and the fact that the judgment creditor in the present case had acted in good faith without knowledge of the prior existing receiving and adjudication orders made in the first bankruptcy, the Senior Assistant Registrar erred in law when he allowed the judgment debtor's application. (paras 7, 8, 9, 10, 11, 12 & 13)

Case(s) referred to:

Re Douglas Tay Guan Shung; ex parte: The Government of Malaysia [1994] 3 CLJ 111 HC ***(refd)***

Re Seow Yin Fong; ex parte United Orient Leasing Company Bhd & Another Case [1994] 2 CLJ 845 HC ***(refd)***

Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia [1995] 2 CLJ 368 SC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 6(3), 8(1), 49(1), (2), 105(1)

For the judgment creditor/appellant - PL Teh; M/s Teh & Assoc
For the judgment debtor/respondent - Adri Amrul Ariffin; M/s Adri & Co

Reported by Suresh Nathan

JUDGMENT

T Selventhiranathan J:

[1] By encl. (35) the judgment creditor appealed against the decision of the Senior Assistant Registrar in allowing the judgment debtor's application in encl. (31) to rescind and annul the receiving and adjudication orders made against him on 16 May 1996 upon the petition herein of the judgment creditor.

[2] The application was made pursuant to the first limb of s. 105(1) of the Bankruptcy Act 1967 ("the Act") which reads as follows:

> Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, ... the court may annul the adjudication.

[3] It is settled law that the powers to rescind and annul receiving and adjudication orders are discretionary and all the relevant facts and circumstances must be considered: see the decision of the then Supreme Court in the case of *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 368.

[4] The judgment debtor's contention in the application in encl. (31) was that he had previously been adjudicated a bankrupt on 21 January 1992 *vide* Bankruptcy No D2-29-3390-1990 in the High Court in Malaya at Kuala Lumpur ("the first bankruptcy") and since the judgment in relation to the petition herein was taken prior to the first bankruptcy order, the judgment creditor's debt was provable in the first bankruptcy and the receiving and adjudication orders made in the petition herein ("the second bankruptcy") should therefore be rescinded and annulled pursuant to s. 105(1) of the Act.

[5] As such the only issue before this court was whether a second bankruptcy could be allowed to be entered against the same bankrupt for the debts provable in the first or prior bankruptcy.

[6] A case in point is the Supreme Court decision in *Sama Credit & Leasing Sdn Bhd (supra)*. The court there held that s. 8(1) of the Act does not prohibit the making of second and subsequent receiving and adjudication orders. In contrast to s. 8(1) of the Act which relates only to receiving orders, ss. 49(1) and 49(2) of the Act render the making of subsequent receiving and adjudication orders against an undischarged bankrupt permissible.

[7] The above case and the cases cited by the judgment debtor were not authority for the proposition that a second bankruptcy is permissible only in respect of debts incurred after the first bankruptcy order, as contended by the judgment debtor. Equally, ss. 49(1) and 49(2) of the Act do not provide that a second bankruptcy must be in respect of liabilities and debts incurred after the date of the first bankruptcy.

[8] In *Sama Credit & Leasing Sdn Bhd (supra)*, the Supreme Court in refusing to rescind and annul the receiving and adjudication orders which had been made, also took into account the failure of the official assignee to advance the situation in court despite being equipped with all relevant information, and it further stated that the respondent there had acted in good faith without knowledge of the prior existing order.

[9] Chong Siew Fai FCJ had this say at p. 372 paras. f to g of the report of that case:

> Thus, amongst the parties to the petition in our present case, only the official assignee possessed or was equipped with most, if not all, of the relevant papers and information as to whether a receiving order and

adjudication order had previously been made against the debtor as well as the stage of proof of debts at any given time. Steps could have been taken to have the petition dismissed eg under section 6(3) of the Act. However, as stated earlier, at the hearing of the petition in the instant case in which the receiving order and the adjudication order were made, there was no representation in Court on behalf of the official assignee to raise any objection but only to seek their setting aside subsequently on the ground that similar orders had, at the instance of another petitioning creditor, been made nearly two years earlier.

[10] In the present case also the official assignee who was present in court did not object when the receiving and adjudication orders were granted on 16 May 1996.

[11] The only difference between the *Sama Credit & Leasing Sdn Bhd* case *(supra)* and the present case is that in the former, it was the official assignee who filed the application to rescind and annul the orders whereas in the latter it was the judgment debtor.

[12] Be that as it may, the judgment debtor also could have applied to have the petition herein dismissed under s. 6(3) of the Act when it came up for hearing. This the judgment debtor failed to do. For ease of reference, s. 6(3) of the Act reads as follows:

(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

[13] Based on the above factors coupled with the fact that the judgment creditor in the present case had acted in good faith without knowledge of the prior existing receiving and adjudication orders made in the first bankruptcy, I was of the view that the Senior Assistant Registrar erred in law when he allowed the judgment debtor's application in encl. (31).

[14] An important point to note here is that, even though it was not raised by the judgment creditor, there was a delay of almost nine years in making this application. The receiving and adjudication orders in question were made on 16 May 1996. The present application in encl. (31) was filed on 18 April 2005. In *Re Seow Yin Fong; ex parte: United Orient Leasing Company Bhd & Another Case* [1994] 2 CLJ 845, the court refused to exercise its discretion to rescind and annul the receiving and adjudication orders on the grounds that the application to do so was made after more than six years and it held that to allow the

A application would greatly prejudice the creditors. In *Re Douglas Tay Guan Shung; ex parte: The Government of Malaysia* [1994] 3 CLJ 111, the court refused to do the same, even though the application was meritorious, on the grounds of abuse of process of court since objection to the defective bankruptcy notice in that case could and should have been
B raised at the first application, which was not done.

[15] In the circumstances, the appeal in encl. (35) was allowed with costs.

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